



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** R.P. Richards, Inc.

**File:** B-272430

**Date:** October 8, 1996

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C. Patrick Stoll, Esq., Herrig & Vogt, for the protester.

Kev Kutina, for Godot Enterprises, Inc., an intervenor.

Alan P. Shapiro, Esq., and Mary B. Workman, Department of the Army, for the agency.

Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Facsimile copy of a bid bond is of questionable enforceability and renders bid nonresponsive; since responsiveness cannot be established after bid opening, the defect in the bond cannot be cured by the bidder's submission of the original bid bond and other information subsequent to bid opening.

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## DECISION

R.P. Richards, Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to Godot Enterprises, Inc., under invitation for bids (IFB) No. DACA05-96-B-0042, issued by the U.S. Army Corps of Engineers for the construction of a dormitory at Luke Air Force Base, Arizona.

We deny the protest.

The IFB required the submission of a bid guarantee in the amount of 20 percent of the bid price, not to exceed \$3 million. Although Richards submitted the apparent low bid, its bid was rejected as nonresponsive, and award was made to Godot—the second low bidder—because Richards submitted a facsimile copy of its bid bond. Richards argues that its bid should not have been rejected under the circumstances here.

A bid bond is a form of bid guarantee designed to protect the government's interest in the event of default; if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all procurement costs. Morrison Constr. Servs., B-266233; B-266234, Jan. 26, 1996, 96-1 CPD ¶ 26. A requirement for a bid bond is a material IFB term with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is defective and must be

rejected as nonresponsive. Id. The determinative issue concerning the acceptability of a bid bond is whether, in the event of a default by the bidder, the contracting agency could be certain the surety would be bound, based on the information in the agency's possession at the time of bid opening. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31.

Facsimile copies of bid bonds generally do not satisfy the requirement for a bid guarantee because there is no way for the contracting agency to be certain from examining a copy--other than by referring to the original after bid opening--whether the original has been altered without the surety's knowledge or consent. If the surety has not agreed to the terms as they appear in the facsimile copy of the bond, the surety's liability under the bond may be in doubt. Regional Dev. Corp.--Recon.; Ware's Van & Storage Co., Inc.--Recon., B-251299.2; B-251431.2, Mar. 16, 1993, 93-1 CPD ¶ 238; Executone Info. Sys., Inc., B-246155, Oct. 21, 1991, 91-2 CPD ¶ 353.

Richards maintains that its bid bond was acceptable because a comparison of the facsimile to the original bond, which it submitted to the agency after bid opening, shows that the facsimile in fact contained no alterations. Richards also has submitted a sworn statement from a director of the surety, stating that the surety intended to be bound by the facsimile signature, a sworn statement from the attorney-in-fact that he intended his facsimile signature on the bond to bind the surety, and a statement from the protester's employee who submitted the bid that he did not alter the bond documents. All of this evidence was presented to the agency after bid opening, and thus cannot form the basis for finding the bid bond acceptable or the bid responsive. Again, the acceptability of a bid bond (and responsiveness generally) must be determined from the face of the bid at the time of bid opening. The deficiency in a bond cannot be cured by submitting the original bond documents, or other evidence, after bid opening, because this would essentially provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Regional Dev. Corp.--Recon.; Ware's Van & Storage Co., Inc.--Recon., supra.

Richards claims that it made reasonable efforts to submit the original bid documents by bid opening, that it informed the agency that it would not be able to do so, and that the agency told Richards to submit the documents by telefacsimile to a Richards employee, who then would hand carry them to the contracting office. Richards's efforts to submit the original bond and the agency's willingness to accommodate Richards have no relevance here. Bidders are responsible for delivering their bids to the proper place at the proper time, J.C.N. Constr. Co., Inc., B-270068; B-270068.2, Feb. 6, 1996, 96-1 CPD ¶ 42, and their failure to timely submit

all bid documents can be excused only in accordance with the late bid provisions in the IFB. See Federal Acquisition Regulation § 14.304-1. As there is no argument or evidence that the original bond documents fall within the late bid exception, the original documents cannot be considered as part of Richards's bid for purposes of determining the acceptability of its bid bond, no matter the effort made to timely submit them.<sup>1</sup>

Richards argues that contracting officials had sufficient information at bid opening to be certain that the surety would be bound: a valid power of attorney; a certificate confirming that the power of attorney was still in effect on June 10, 1996, the date of execution on the facsimile copy of the bond; and a copy of a notary acknowledgment attesting to the signature of the attorney-in-fact on a bid bond on June 10, 1996, which was also signed by the protester's principal. Further, Richards argues, since the bid package was mailed out on June 11, and ultimately was transmitted by telefacsimile on June 12 to the Richards employee who hand-delivered the bid, there was a link between the documents that precluded sufficient time or reason for alteration. In any case, Richards asserts, there was nothing material on the bid bond that could have been altered.

We do not agree that the agency possessed information at bid opening sufficient to establish the surety's liability. As discussed, there was no way for the agency to determine from the bid documents whether the bond had been altered after being signed. In this regard, even accepting Richards's version of events, 2 days passed between the execution of the bid bond and the submission of the facsimile copy to the government; obviously, alteration of the facsimile copy was possible within that time. Contrary to Richards's assertion, furthermore, there were several material elements of the bond which could have been altered, including the solicitation number and the penal amount of the bond. We conclude that the agency properly rejected Richards's bid as nonresponsive.

The protest is denied.

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<sup>1</sup>To the extent Richards may be arguing that it did not attempt timely submission of the original bond documents due to the agency's indication that the facsimile would be sufficient, we note that Richards does not specifically claim that it was told that a facsimile copy would be acceptable. In any case, oral advice from government officials does not bind the government and a bidder relies on such advice at its own risk. Selrico Servs., Inc., B-259709.2, May 1, 1995, 95-1 CPD ¶ 224.